

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUANE THOMAS PEEVEY,

Defendant-Appellant.

UNPUBLISHED

November 13, 2003

No. 242537

Livingston Circuit Court

LC No. 02-012663-FC

Before: O’Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant was convicted in a bench trial of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and was sentenced to 15 to 40 years’ imprisonment. He appeals by leave granted. We affirm. This case arose when defendant digitally penetrated his six-year-old stepdaughter’s vagina while she slept.

Defendant first argues that the trial court failed to elicit from defendant a knowing and understanding waiver of his right to a jury trial. We disagree. We review this unpreserved issue for plain error that affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The trial court made proper findings on the record and complied with the requirements of MCR 6.402(B) in every respect, so defendant fails to demonstrate any plain error that affected his rights.

Next, defendant argues that there was insufficient evidence of penetration to support his CSC I conviction. We disagree. A claim that evidence was insufficient to support a conviction raises an issue of law that we review de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecutor proved all of the elements of the offense beyond a reasonable doubt. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992).

Under MCL 750.520a(o), “sexual penetration” includes “intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body” In addition, we have interpreted the term “penetration,” as it is used in MCL 750.520b(1)(a), to include penetration of a female’s outermost labia. *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981).

During the physical examination of the victim, a doctor observed that the inside of the victim's labia appeared to be "slightly more reddened." When the doctor touched the reddened areas, she noticed that the victim was unusually sensitive in those areas. The evidence of penetration the doctor found corresponds with the victim's description of where she felt stinging and irritation when she awoke and found defendant over her. So the physical evidence and testimony, viewed in a light most favorable to the prosecution, could have led a rational trier of fact to conclude that the prosecutor established penetration beyond a reasonable doubt.

Defendant next contends that the trial court abused its discretion when it determined that substantial and compelling reasons existed to depart from the legislative sentencing guidelines. We disagree. According to MCL 769.34(3), a trial court may not depart from the statutory minimum sentence range without reciting on the record the underlying substantial and compelling reasons for its sentencing departure. Before a trial court's reasons may qualify as substantial and compelling, they must be objective and verifiable. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). We review de novo whether a trial court relied on objective and verifiable reasons for its departure. *Id.* at 264-265. Finding that the reasons are objective and verifiable, we then give deference to the trial court's experience and familiarity with the facts when we review whether the reasons are substantial and compelling. *Id.* at 264-265, 270.

The trial court recited five reasons for the sentencing departure, all of them individually substantial and compelling. Also, giving due deference to the trial court's unique position, their collective application to defendant's situation justify the trial court's significant departure from the recommended range of 42 to 70 months. The trial court first considered that prior record variable five (PRV 5) properly registered defendant's misdemeanor, but failed to account for the fact that the "window peeping" misdemeanor was a sexually motivated crime against a different underage stepdaughter. The sexual and paternal nature of defendant's past crime is an objective and verifiable factor because it does not dwell exclusively in the judge's mind and is capable of confirmation. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Because the conviction merited defendant only two PRV points, despite its powerful indication of defendant's propensity to commit such crimes, the trial court correctly found its underrating in PRV 5 a substantial and compelling reason for departure.

The trial court's next cited defendant's denial of responsibility and lack of remorse as a reason for its departure. Defendant's pre-sentence investigation report (PSIR) indicates that defendant did not believe he deserved punishment for penetration although he admitted spreading the victim's labia and looking at her vagina. He did not view the digital penetration of his six-year-old stepdaughter's labia as "something really extreme." Instead, he stated that it was "only a five or ten second deal." By essentially admitting the conduct but downplaying its importance, defendant objectively and verifiably demonstrated his lack of remorse. The trial court did not err when it found this factor substantial and compelling.

The court also considered the victim's age and defendant's violation of her trust, which made defendant much more culpable than indicated by his OV 10 score. Defendants receive ten points under OV 10 by exploiting either a victim's youth, their authority status, or a domestic relationship with the victim. MCL 777.40. The trial court correctly found that the tender age of the victim and defendant's special bond with her were objectively and verifiably absent from OV

10's scoring standards, but merited consideration nonetheless. The trial court acted within its discretion when it found these factors substantial and compelling.

Last, the court considered the impact of this crime on the victim. Defendant's PSIR indicates that, as a result of this crime, the victim continuously had nightmares that defendant was going to return to her home and shoot her, her mother, and her brother. At the time of sentencing, the victim was also having nightmares in which any man she knew or trusted would turn into a monster and chase her. The victim is in counseling for her fears, behavioral problems, and anger. During sentencing, the victim's mother stated that the victim is constantly teased because all the other children know that her dad "did something to her." Given the victim's persistent nightmares, the teasing she faced at school, and her ongoing need for counseling, the trial court did not err when it found that the highest score under OV 4 failed to adequately reflect the objective and verifiable impact on this victim.

A court does not abuse its discretion to depart from the sentencing guidelines when its decision "is within the range of options from which one would expect a reasonable trial judge to select." *Babcock, supra* at 269. In light of the victim's tender age and the emotional impact of this crime on her, and taking into consideration defendant's "window peeping" conviction, lack of remorse, and violation of the victim's trust, the trial court did not abuse its discretion when it concluded that substantial and compelling reasons justified departing from the applicable guidelines range in this case. Because the trial court's departure fell within the range of sentences a reasonable trial court would select, it did not abuse its discretion.

Finally, defendant argues that the extent of the trial court's departure from the applicable sentencing guidelines range was not proportional. We disagree. A departure from the guidelines range must be proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock, supra* at 262. Because defendant showed no credible remorse for his horribly invasive crime and displays a history of increasingly severe sexual behavior toward young girls in his care, his sentence was proportionate to the seriousness of his conduct and history.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder